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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1885

EASTALCO ALUMINUM COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,

Respondents.

BRIEF FOR RESPONDENT PEOPLE'S COUNSEL OF MARYLAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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PRELIMINARY STATEMENT

This brief in opposition to the petition for Writ of Certiorari is submitted in behalf of the respondent John K. Keane, Jr., People's Counsel of the Public Service Commission of Maryland, who successfully urged in all proceedings below the application to Eastalco of the same fuel adjustment charge imposed by the Public Service Commission of Maryland on all other customers of The Potomac Edison Company. The standing of People's Counsel to participate in the proceedings below on behalf of residential and noncommercial consumers and to respond to the Petition for Writ of Certiorari in this court was conferred by Chapter 756 of the Acts of Maryland of 1976.

OPINIONS BELOW

The opinions of the Public Service Commission appear at App. 26a. The opinions of the Circuit Court of Baltimore City affirming the Commission appear at App. 18a. The opinion of the Court of Special Appeals of Maryland affirming the Circuit Court appears at App. 11a. The order of the Court of Appeals of Maryland denying review of the decision of the Court of Special Appeals appears at App. 1a. The Petition for Certiorari does not seek review of any reported court opinion; the opinions of courts below each being unreported.

JURISDICTION

Although, as stated by Petitioner (Petition for Certiorari, page 11), the existence of a constitutional contention was mentioned to each of the tribunals below, it is questionable whether the bare reference to the contract clause in the caption of a brief but not its body (App. 91a-92a) or the equally generalized reference to the clause in memoranda filed in the courts below met the jurisdictional requirement imposed by 28 U.S.C. § 1257 that "the claim of invalidity and the grounds therefor be brought to the attention of the state court with fair precision . . ." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L. Ed. 184, 49 S. Ct. 61 (1928), *see Street v. New York,* 394 U.S. 576, 583, 22 L. Ed. 2d 512, 89 S. Ct. 1354 (1969); *Edwards v. Elliott,* 21 Wall (88 U.S.) 532, 22 L. Ed. 487 (1874).

QUESTIONS PRESENTED

1. Is a "federal question of substance not theretofore determined by this court" presented by the claim that a state public service commission is constitutionally disabled from imposing its rates on parties to contracts for utility services entered into subsequent to enactment of the rate-making powers of the commission.

2. Are the decisions of the administrative agency and courts below "probably not in accord with applicable decisions of this court" notwithstanding their agreement with *Union Dry Goods Corp. v. Georgia Public Service Commission,* 278 U.S. 372; *Midland Realty Co. v. Kansas City Power and Light Co.,* 300 U.S. 109 and a long line of other cases.

3. Do the unreported decisions below, addressed to a single and nonrecurring fact situation, otherwise present "special and important reasons" for review.

STATEMENT

By Chapter 180 of the Maryland Acts of 1910, the General Assembly of Maryland enacted the Maryland Public Service Commission Law, now codified with subsequent modifications as Article 78 of the Annotated Code of Maryland. The statute as enacted is commonplace in form and closely resembles Public Service Commission laws of the overwhelming majority of American states. Indeed, it was said of the Maryland law that it was "a copy of the New York law with few changes. The copy is so faithful in parts that Section 31½ provides for the filing of sliding scale charges with the 'proper Commission' as if we had more than one Commission as is the case in New York." Hill and Padgett, *Public Service Law of Maryland* (1913) at 3. In keeping with the universal understanding of the scope of state police powers relating to service by legal monopolists, the Maryland act was almost immediately given a broad construction, even in its application to contracts antedating its enactment, and indeed antedating the Constitution of 1867 providing the legislature of 1910 with its powers. In *Willard v. Cumberland and Pennsylvania Railway Company,* 3 Pub. Serv. Comm. Rpts. 147 (1912) the Maryland Public Service Commission declared: "The language of this section is broad enough to repeal any special rate allowed by law to any public service

corporation whether allowed by the Charter of the Corporation (unless done so unconditionally before the adoption of the Constitution of 1851) or by local law."

This understanding was almost immediately confirmed by a decision of the Maryland Court of Appeals which, in 1915, was presented with a case involving modification in a rate proceeding of a contract entered into in 1906 prior to the rate proceeding, and indeed prior to enactment of the Maryland Public Service Commission law, between a public utility and a private customer. The Court of Appeals of Maryland in accordance with well-established authority unequivocally ruled:

> "The right to regulate rates for which water will be supplied is in its nature the execution of one of the powers of the state, of which it can no more divest itself than it can part with its power of taxation. The power may or may not be exercised but its nonusage is not an abandonment of the right. The nature of the right as an exercise of the power of the State is commonly referred to that class of powers designated as the police power, and the right extends not merely to the regulation of the rates but to the regulation of other matters connected with the service afforded to the public . . . . Contracts, even as between individuals, when entered into are necessarily subject to the control of the police power of the State, whenever such contracts relate to matters which are or may be subject to the exercise of such powers, and as far back as the case of *Munn v. The People,* 94 U.S. 113, it was laid down that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good as long as he maintains the use." *Yeatman v. Public Service Commission,* 126 Md. 513, 518, 95 A. 158 (1915).

The *Yeatman* case was widely followed elsewhere, see Annotation, *Power of State to Change Private Contract*

Rates for Public Utilities, 9 A.L.R. 1423 (1920). The principles of the *Yeatman* case have been consistently followed by the Maryland Courts and administrative authorities. See *Blum v. Engleman,* 190 Md. 109, 115 (1947), *Allied American Mutual Fire Insurance Company v. Commissioner of Motor Vehicles,* 219 Md. 607 (1958), *Maryland Medical Services, Inc. v. Carver,* 238 Md. 466 (1964), *Foley v. Washington Suburban Sanitary Commission,* 283 Md. 140, 152 (1978); 59 Opinions of the Attorney General of Maryland 679 (1974); 60 Opinions of the Attorney General of Maryland 375 (1975); 61 Opinions of the Attorney General of Maryland 929 (1976).

Against this background, and in contemplation of this body of law, Petitioner, a company which operates an aluminum reduction plant in Maryland and which purchases electricity from the Potomac Edison Company, entered into an Agreement executed in 1967, for the supply of electricity. The first section of Paragraph 4.K. of that Agreement, in recognition of the statutory powers of the Maryland Public Service Commission, flatly declared: "Provisions of this Agreement and the charges provided for herein are subject to regulation by the regulatory authorities having jurisdiction." (See E. 758, App. 19.A)[1]

Additional provisions of Paragraph 4.K. of the agreement undertook to limit changes in fuel rate adjustments which might be "applied for" by Potomac Edison by providing a percentage limit measured in terms of the increase sought for other industrial customers and by providing that increases in the contract charges should be applied for "only in connection with an application for changes in the level of charges applicable to all industrial

[1] It is revealing that, although the gravamen of the petition is an alleged impairment of contract rights, the contract in question, including this important clause, nowhere appears in the Appendix to the Petition, save insofar as Section 4.K. is quoted in the Opinion of the Circuit Court for Baltimore City.

customers." These provisions purported to limit only the amount of any increase which *Potomac Edison* might apply for, and not the authority of the *Public Service Commission* to determine just and reasonable rates in a proceeding instituted *sua sponte* by it.

Nowhere in the agreement is there any language attempting to limit either the statutory power of the Commission or the express recognition of that power in the first sentence of Paragraph 4.K. of the agreement.

On April 24, 1974, the Public Service Commission instituted, on its own motion and not on the application of Potomac Edison, an investigation into the operation of fuel rate adjustment clauses in Maryland. Major electric generating companies, including Potomac Edison, were made a party to the proceeding. On October 4, 1976, the Hearing Examiner issued a proposed order containing a recommendation that the Potomac Edison Company in its next rate case, and in any event within two years, revise fuel rate provisions of its contract with Eastalco to reflect the same fuel adjustment formula that it applied to all of its other customers. This order was appealed to the Commission by its People's Counsel by reason of disagreement with other provisions of the order and at the Commission level Eastalco intervened and requested that the matter of its fuel rate adjustment clause be litigated in either a separate proceeding within two years or in the Potomac Edison Company's next base rate proceeding, as recommended by the Hearing Examiner.

In due course, on February 2, 1977 Potomac Edison Company filed a base rate proceeding. In connection with this proceeding, evidentiary hearings were held by the Commission in which Eastalco intervened and appeared throughout. On August 2, 1977, the Commission entered an Order, one of the two Orders appealed from by Eastalco, directing the Potomac Edison Company to file new rates

which would place Eastalco on the same fuel adjustment clause as all other customers. On August 30, 1977, 28 days later, the Commission entered a similar Order in the generic fuel rate adjustment case instituted in 1974 and applicable to all public utilities. These two Orders are the subject of the subsequent appeals by Eastalco and the present Petition for Certiorari.

The reasonableness of the action of the Public Service Commission is patent. The procedure followed by the Commission in making changes in the fuel rate adjustment clauses was precisely the procedure requested by Eastalco: consideration of the issue not in the generic rate proceeding, but in either a separate proceeding affecting Eastalco alone or in the next Potomac Edison rate proceeding. Eastalco was accorded full due process in the Potomac Edison rate proceeding. The substantive reasonableness of the Commission's determination is suggested by the economic evidence in the record. The Eastalco contract of 1967 was no minor contract. The evidence on the record demonstrated that Eastalco purchased approximately 43% of *all* power sold by Potomac Edison (E. 253), testimony to the energy-intensive character of the aluminum industry. The fuel rate adjustment clause contained in the Eastalco contract of 1967 gave Eastalco the benefit of the cost for fuel paid by the Hatfield Ferry plant of Potomac Edison and further refined fuel costs by an artificial assumption of a heat factor applicable to that plant of 9091 Btu per Kw hour net generation.

By the time the Commission acted to modify the contract rates in 1976, the irrationality of the assumption upon which the Eastalco contract was founded was patent. The Potomac Edison system was an integrated system and Eastalco's power was drawn from all the plants in the system, not peculiarly from the Hatfield Ferry plant. Because of the location of the Hatfield Ferry plant, and the character of the fuel burned by it, the price per ton of fuel

burned there was $20.41, as against $22.26 for the next lowest plant, the Albright Plant, and $24.92 for the Harrison generating station — the highest cost station. Further, it was demonstrated that the Hatfield Ferry station was significantly less efficient in its use of fuel than anticipated by the contract, requiring 10419 Btu for each Kw hour of net generation rather than the 9091 Btu assumed by the contract (E. 255, 419), a difference of 14.6%.

There was also evidence before the Commission which indicated that this situation would get worse rather than better. This evidence disclosed that the Potomac Edison sales territory would change beginning on January 1, 1977 and that it would no longer serve any Pennsylvania customers. In addition, during 1976, the test year for purposes of the rate case, Eastalco doubled its power requirements by adding a second pot line in full service for only 8 months of the year. This assured that in future years, Eastalco's energy purchases would significantly exceed the test year level of 43% of Potomac Edison's total energy sales (E. 52-53).

The significance of any understatement of fuel costs to Eastalco was also greatly enhanced by another factor: the worldwide escalation of fuel costs following the 1973 oil embargo, which greatly enhanced the significance of fuel rate adjustment clauses. There was testimony before the Commission indicating that in 1971 fuel accounted for only 20.75% of each dollar of revenue of Potomac Edison from electric sales, and only 31.49% of total operating and maintenance expenses of Potomac Edison. By 1976, only five years later, fuel expense accounted for 38.25% of revenue from sales and a massive 61.35% of operating and maintenance expenses of the company (E. 414-430).

There was no factual justification for according Potomac Edison the benefit of the Hatfield Ferry costs (or more

accurately assumed costs) since there was no provision in the contract that Eastalco's service would be interrupted when the Hatfield Ferry station was shut down, no alternative rate schedule for service from other plants during such interruptions, no exclusion of Hatfield Ferry fuel costs from other customers' fuel clauses, and no reason to believe that Eastalco was served only from Hatfield Ferry (E. 419-420). It was estimated that in the month of November, 1976 Eastalco "unduly benefitted" by more than $600,000 in consequence of its fuel clause (E. 421), thus constituting a subsidy by it of other customers of Potomac Edison amounting to more than $7 million per year. Indeed, in addition to the testimony relating to a preference for Eastalco on the order of $600,000 per month, there was testimony of another witness suggesting a preference of the magnitude of $8,850,000 per year (E. 311, 319).

To the extent that Eastalco's cost characteristics resulted in lesser line losses, the final Order of the Commission took account of this by providing an adjustment figure for transmission line delivery efficiency. The Commission's final Order further allowed Eastalco a different base rate from that allowed other users, demanding only that Eastalco pay its own rather than a fictitious share of fuel expense. The Commission's action in so doing was in conformity with the provisions of Article 78, Section 26 of the Maryland Code prohibiting preferences and discrimination by public service companies.

Summarizing, the Chief Executive Officer of Potomac Edison testified before the Commission that Eastalco's 1976 use of power increased by 100% by reason of the addition of a second pot line (App. 173, 174). The previous increases in Eastalco's contract rates, according to his testimony, excluded considerations attributable to increases in costs of fuel (E. 51-52), and the contract rate

itself was primarily based on its effect on utility capacity (E. 57).

Eastalco complains of the fact that the Commission's ruling left provisions of the contract other than the fuel rate adjustment provision undisturbed. There was substantial evidence which indicated that the matching of revenues and costs on the demand side of Eastalco's rates, undisturbed by the Commission, likewise resulted in substantial under-recovery by the utility of its costs (E. 311-319). The Commission saw fit to address only the fuel rate, the rate most dramatically affected by recent economic changes.

On the basis of the record before it, the Commission concluded that the fuel rate adjustment clause of Eastalco should be modified to conform to that of all other Potomac Edison customers. It expressly rejected, however, suggestions by People's Counsel that the balance of the Eastalco contract be altered to eliminate the special base rate accorded Eastalco since the base rate, unlike the fuel adjustment clause, was directly related to load factors peculiar to Eastalco (App. 76a). Its determination was affirmed by both the Circuit Court of Baltimore City (App. 18a) and the Court of Special Appeals of Maryland (App. 13a). The Court of Appeals of Maryland, deeming the question now presented by Eastalco too insubstantial to warrant review, denied certiorari on February 22, 1980 (App. 1a).

ARGUMENT

The considerations governing the grant or denial of certiorari by this Court are outlined in Rule 19 of its Rules:

> "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

> reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: a) where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

This case is not of a character which renders it important to any save the litigants. It is no longer of significance to even the litigants because in 1978 the General Assembly of Maryland enacted into law a requirement of uniformity among electric fuel rates. Article 78. Section 54(f) of the Annotated Code of Maryland, enacted by Chapter 173 of the Acts of 1978. The opinions of the courts below, including that of the Maryland Court of Appeals, are unreported opinions. The basic reason this case does not require review, however, is more fundamental than merely the absence of "special and important reasons" for review. It is found in the repeated prior determinations by this court of precisely the federal question sought to be raised by the present Petition: the application of the contract clause to alterations of contracts between public service companies and their customers. The question here presented was directly determined by the Supreme Court of the United States in the leading case of *Union Dry Goods Company v. Georgia Public Service Corp.*, 248 U.S. 372, 63 L. Ed. 309, 39 S. Ct. 117 (1918).

That case involved a contract between a public utility and dry goods company executed in July of 1912 for a period of five years. Subsequent to the entering into of the contract, the Railroad Commission of Georgia entered an order providing a rate schedule effective March 1, 1914 inconsistent with the contract terms and further providing that "all special rates, whether in the form of contracts for definite periods or informal in excess of these prescribed

rates are illegal". The Supreme Court observed emphatically:

> "It will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that if given effect, they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the railroad commission.
>
> "Except for the seriousness with which this claim has been asserted, and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract right must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus, in *Manigault v. Springs,* 199 U.S. 473, 480, 50 L. Ed. 274, 26 Sup. Ct. 127, 130, it was declared that: 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from properly exercising its police powers for the general good of the public though contracts previously entered into between individuals may thereby be affected.' This on authority of many cases which are cited. In *Hudson Water Co. v. McCarter,* 209 U.S. 349, 357, 52 L. Ed. 828, 28 Sup. Ct. 529, it is said that: 'One whose rights, such as they are, are subject to state regulation, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter.'
>
> [Citing additional cases]
>
> "These decisions, a few from many to like effect, should suffice to satisfy the most sceptical or belated investigator that the right of private contract must yield to the exigencies of public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed."

There is nothing outdated about the principles of the *Union Dry Goods* decision. In *Midland Realty Company v. Kansas City Power & Light Company,* 300 U.S. 199, 81 L. Ed. 540, 57 S. Ct. 345 (1937), a unanimous Supreme Court, speaking through Mr. Justice Butler, sustained the application of rates promulgated pursuant to the Missouri Public Service Commission law to a contract entered into (unlike the contract here) prior to the enactment of the statute. The court declared:

> "The state has power to annul and supersede rates previously established by contract between utilities and their customers [Citing *Union Dry Goods Company v. Georgia Public Service Company, supra, Producers Transportation Company v. Railroad Commission,* 251 U.S. 228, 232; *Kansas City Bolt & Nut Company v. Kansas City Light & Power Company,* 252 U.S. 571 and *Sutter Butte Canal Company v. Railroad Commission,* 279 U.S. 125, 137, 138]. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them. . . . Plainly enforcement of the rates in accordance with the statutes did not violate either the contract clause of the Constitution or the due process clause of the 14th Amendment."

In the subsequent case of *Veix v. Sixth Ward Association,* 310 U.S. 32, 38-9, 84 L. Ed. 1061, 60 S. Ct. 792 (1939), Mr. Justice Reed, speaking for a unanimous court, after noting that contractual rights were subject to valid exercises of the police power, observed: "Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power." Recent decisions of this Court enforcing the contract clause in no way alter the force of these long-declared principles. In *United States Trust Company of New York v. New Jersey,* 431 U.S. 1, 52 L. Ed. 2d 92, 97 S. Ct. 1505 (1977), this Court set forth the requirement that

legislative impairments of contract rights must "serve a legitimate purpose and set forth reasonable conditions." This rational-basis test is fully met by an impairment which has the purposes of placing all utility consumers on an equal footing and adjusting rates to the dramatically changed conditions following recent sharp increases in energy costs. It was noted by Ernst Freund as long ago as 1917:

> "A monopoly even if legalized is tolerable only upon conditions of equal service to all and no favors; this has become almost a commonplace of the law of privileged utilities." Freund, *Standards of American Legislation* 130 (1917).

This Court, in the *United States Trust Company* case noted with respect to state action impairing private contracts such as that here:

> "The states must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them.'" *Hudson Water Company v. McCarter,* 209 U.S. 349, 357 (1908)."

The *United States Trust Company* case also recognizes that the restrictions of the contract clause apply with greater force to legislation impairing government contracts than to legislation impairing private contracts:

> "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonable-

> ness and necessity is not appropriate because the state's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the contract clause would provide no protection at all. For similar reasons a dual standard of review was applied under the Fifth Amendment to federal legislation abrogating contractual gold clauses. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers." *Perry v. United States,* 294 U.S. 330, 350-51 (1935). Cf. *Norman v. Baltimore & Ohio Railway Co.,* 294 U.S. 240, 204-05 (1935)" (431 U.S. at 25-26 and note 25).

The only modern case in which the Supreme Court has invalidated a state legislative act impairing private contracts, *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234, 57 L. Ed. 767, 98 S. Ct. 2716 (1978), likewise is of no aid to Petitioner. Unlike Allied Steel, this is not a case where a legislature "entered a field it had never before sought to regulate" by "superimposing retroactive obligations upon [a] company . . . only because it closed its office in the State." 438 U.S. at 240. Nor does it involve a government action with "an extremely narrow focus." The action of the Public Service Commission here at issue affects at least 43% of all the power sold in the Potomac Edison Service territory (E. 253), fuel costs in turn constituting more than 61% of the operations and maintenance cost of the utility (E. 415). The action plainly was taken "to deal with a broad generalized economic or social problem" and equally clearly "operated in an area already subject to state regulation at the time the company's

contractual obligations were originally undertaken" within the meaning of the standards listed in *Allied Structural Steel Company v. Spannaus, supra.* The continued vitality of the *Union Dry Goods-Midland-Veix* line of cases was expressly indicated by the Supreme Court in *Allied Structural Steel Company v. Spahnaus*, by its citation of the *Veix* case, and by its observations, citing Veix and other cases, in footnote 24.

Leading federal and state cases decided after the *U.S. Trust Company* and *Allied Structural Steel* cases recognize the vitality of the principles of *Union Dry Goods. See Minnesota Gas Co. v. Public Service Commission*, 523 F.2d 581, 583 (8th Cir. 1975), *cert. den.*, 96 S. Ct. 1114, *Reed v. Knollwood Park Cemetery*, 441 F. Supp. 1144 (E.D.N.Y. 1977) (Bartels, J.) and *Miller and Sons, Inc. v. Hawkins*, 373 So. 2d 914 (Sup. Ct. Fla., July 27, 1979).[2]

The interpretation of the Contract Clause contended for by Petitioner would effectively invalidate the prohibition against discrimination and preference contained in Art. 78 Section 26 of the Annotated Code and the substantial evidence rule contained in Article 78, § 97. The PSC action

[2] The decisions of this Court in *United Gas Pipeline Company v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 358 (1956), discussed in the petition; involved construction of a federal statute to prohibit utility companies who have entered into contracts with users from applying for new schedules inconsistent with those contracts. Aside from the fact that the principles of these cases hardly apply to a proceeding such as that here instituted *sua sponte* by a regulatory commission, these cases involve purely matters of statutory construction.

Even if the *Sierra-Mobile* situation were presented by the facts here, which it is not, Maryland courts would not be obliged to follow the federal construction of the Natural Gas Act in construing the Maryland Public Service Commission law in its application to electricity produced from coal. It is striking that the irrelevancy of the *Sierra-Mobile* line of cases is recognized even by the Petition, the constitutional question being said to "present a question not reached in *Sierra-Mobile.*" (Pet., p. 17).

conforms with both those legal requirements and there is no constitutional basis for the substitution of § 205 of the Federal Power Act for them.

CONCLUSION

In 1918 an exasperated Mr. Justice Clarke, writing in the Union Dry Goods case, cited decisions dating back 40 years which he thought "should suffice to satisfy the most sceptical or belated investigator", noting that they would not be dealt with "except for the seriousness with which this claim has been asserted and is now pursued into this Court" being "so settled as not to merit further discussion". The principles of law applicable to the present Petition are even more settled now than they were in 1918 and dictate that the Petition for Certiorari must be denied.

Respectfully submitted,

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